Supreme Court, U.S.
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No. 00-783

In the Supreme Court of the United States

THE PITT NEWS,
Petitioner

v.

D. MICHAEL FISHER, MAJOR FRANCIS KOSCELNAK, AND JOHN E. JONES, III,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying a motion to preliminarily enjoin the enforcement of a duly enacted statute pending its challenge in the courts below?

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STATEMENT OF THE CASE

1. This petition arises out of petitioner's efforts to preliminarily enjoin the respondents from enforcing a statute against others, pending petitioner's challenge to its constitutionality on First Amendment grounds. Pet. App. 3a. Petitioner is *The Pitt News*, a student newspaper located at the University of Pittsburgh. C.A. App. 9b.[1] Respondents are D. Michael Fisher, the Attorney General of Pennsylvania; Major Francis Koscelnak, the Director of the Bureau of Liquor Control Enforcement within the Pennsylvania State Police; and John E. Jones, III, the Chairman of the Pennsylvania Liquor Control Board, an agency of the Commonwealth. Pet. App. 24a.

Petitioner challenges a provision of the Pennsylvania Liquor Code, codified at Pa. Stat. Ann., tit. 47, §4-498 (Purdon 1997) and known as "Act 199." Act 199 substantially rewrote Section 4-498, and added the following provisions which are pertinent to this case:

> (e) The following shall apply to all alcoholic beverage and malt beverage advertising:
>
> (5) No advertisement shall be permitted, either directly or indirectly, in any ... newspaper ... by, for or in behalf of any educational institution.

* * * * *

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[1]The Appendix and Supplemental Appendix in the Court of Appeals will be referred to respectively as "C.A. App. ___" and "C.A. Supp. App. ___."

> (g) For purposes of this subsection, the term "advertisement" shall mean any advertising of alcoholic beverages through the medium of ... newspapers....

47 P.S. §4-498(e)(5), (g) (Purdon 1996).[2] Violations of Act 199 are misdemeanors. First offenses are punishable by a fine of between $100 and $500 or imprisonment for up to three months; second offenses carry a mandatory minimum sentence of three months in jail.

Act 199 applies only to liquor licensees or manufacturers, and not to publishers. Pet. App. 35a & n.40. Thus, a bar or restaurant that advertises drink specials or other information pertaining to alcoholic beverages in *The Pitt News*

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[2]The full text of these provisions is as follows:

(e) The following shall apply to all alcoholic beverage and malt beverage advertising:

> (5) No advertisement shall be permitted, either directly or indirectly, in any booklet, program book, year book, magazine, newspaper, periodical, brochure, circular or other similar publication published by, for or in behalf of any educational institution.
>
> * * * * *
>
> (g) For purposes of this subsection, the term "advertisement" shall mean any advertising of alcoholic beverages through the medium of radio broadcast, television broadcast, newspapers, periodicals or other publication, outdoor advertisement or any other printed or graphic matter, including booklets, flyers or cards, or on the product label or attachment itself.

could be subjected to prosecution, but petitioner or its staff could never be prosecuted. Pet. App. 5a.

The objectives of Act 199 are to combat the problems of both underage drinking, and binge drinking by individuals of all ages, on college campuses. Pet. App. 27a. As to the effectiveness of Act 199 in achieving those objectives, the district court was advised of and provided with copies of three studies that established a definite correlation between alcohol advertising and increased alcohol consumption, particularly among the young. C.A. App. 202b-203b; C.A. Supp. App. 1-65; C.A. Supp. App. 34, 49-50, 53.

Petitioner publishes on each weekday during the school year and weekly during the summer, and receives all of its funding from advertising revenues. For the academic year 1998-1999, petitioner operated on a budget of over $603,000. Pet. App. 29a. In December of 1997, petitioner learned that one of its advertisers had been cited for violating Act 199; subsequently, petitioner informed its advertisers that it would no longer accept alcohol-related advertising. Pet. App. 30a-32a. In 1998, petitioner lost about $17,000 in revenue which it attributed, in large part, to the enforcement of Act 199; although some of the loss was attributable to other costs such as increased expenses. Pet. App. 33a. This loss of revenue affected the length of petitioner's newspaper. Pet. App. 33a.

2. Petitioner brought this action in the United States District Court for the Western District of Pennsylvania pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the enforcement of Act 199. Petitioner filed its action in April of 1999, and immediately moved for a preliminary injunction. After an evidentiary hearing, the district court denied the motion for a preliminary injunction. Pet. App. 45a. The district court held that petitioner lacked

standing to challenge Act 199, Pet. App. 38a-43a; and that, in any case, petitioner had failed to establish that enforcement of Act 199 had caused irreparable injury. Pet. App. 43a-44a.

3. The Court of Appeals affirmed the denial of the preliminary injunction, although on reasoning different from that of the District Court. The Court of Appeals held that petitioner did have standing to challenge Act 199, but held that petitioner had not shown that it was likely to succeed on the merits of its First Amendment claim. The Court of Appeals noted that, while Act 199 restricts the advertising which liquor licensees may buy, it "does not directly restrict the content of *The Pitt News*." Pet. App. 21a. Thus, while area bars, for example, may not advertise their nightly drink specials in *The Pitt News*, the "*The Pitt News* could ... contact area bars, find out what their nightly drink specials are, and publish a weekly listing of goings-on about town...." *Ibid.*

While "*The Pitt News* had demonstrated a connection between the enforcement of Act 199 and the reduction in its advertising revenues, ... [that] does not mean that one of its constitutionally protected interests has been injured." *Ibid.* Rather, Act 199 "amounts to nothing more than an incidental economic effect of a regulation aimed at closely regulated third parties." *Ibid.* "Thus, although *The Pitt News* has no doubt felt an economic effect resulting from the enforcement of Act 199, this does not amount to a violation of its First Amendment rights." Pet. App. 22a-23a.

REASON FOR DENYING THE WRIT

Petitioner does not claim that this case presents a novel issue of federal law which the Court has not, but should, address. Nor does petitioner claim that this case presents an issue on which the courts of appeals have issued conflicting decisions; indeed, to the extent that the petition addresses this issue at all, it suggests that the lower courts are in substantial -- although in petitioner's view, erroneous — agreement on the proper approach to claims such as are presented here. *See* Pet. at 20 & n.13 (collecting cases).

Rather, petitioner relies simply on the assertion that the Court of Appeals' decision is "inconsistent with at least four well established First Amendment doctrines." Pet. at 13. In other words, petitioner thinks that the Court of Appeals decided this case incorrectly. Petitioner may well believe that this presents an issue of "exceptional national importance," Pet. at 12; but disagreement over the application of established principles to the facts of a specific case does not merit the Court's discretionary review. Moreover, petitioner's claim that this case presents "an unprecedented restriction on newspaper publication" which the Court of Appeals "exempted from First Amendment scrutiny," Pet. App. 13, rests upon a misunderstanding of both the underlying issue and the Court of Appeals' resolution of it.

The Court of Appeals Correctly Resolved this Case Through the Routine Application of Well-Established Principles.

As petitioner sees it, this case involves a "content-based law banning protected speech in a targeted class of newspapers," Pet. App. 13, which the Court of Appeals upheld

in the face of various constitutional challenges. Petitioner is wrong in two respects.

First, as both the Court of Appeals and the District Court appreciated, Act 199 does not ban any speech by the petitioner. Pet. App. 5a, 35a & n.40. Act 199 places no restrictions, disabilities or obligations of any kind on petitioner; Act 199 leaves petitioner free to say, or print, whatever it wants, including information related to alcohol. Pet. App. 21a. Act 199 simply does not apply to petitioner; it applies only to liquor licensees and manufacturers.[3] What is at stake here for petitioner is not the right to speak or print, but the "right," if it can be called that, to be free from the incidental effects of restrictions on a closely regulated industry.

Second, while petitioner raises numerous constitutional challenges to Act 199 in its petition; the merits of those challenges have yet to be considered by any court. What the Court of Appeals has decided here, is to affirm the district court's denial of the extraordinary remedy of preliminarily enjoining enforcement of a duly enacted state statute pending its challenge in the courts below. That decision by the Court of Appeals is based upon this Court's decision and provides no basis for this Court to grant certiorari.

Petitioner sought before the district court the truly extraordinary remedy of preliminarily enjoining a duly enacted state statute pending its challenge in the courts. This Court has repeatedly held that such statutes are presumptively

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[3]The Court of Appeals noted that, even as to those to whom it applies, Act 199 effects no "substantial abridgement of their free speech rights," leaves open substantial alternative channels of communication, and has had no chilling effect. Pet. App. 18a.

constitutional. *Bush v. Al Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J. concurring); *Heller v. Doe*, 509 U.S. 312, 320 (1993). This Court has also long recognized that the standard of review of the grant or denial of injunctive relief is abuse of discretion. *University of Texas v. Camenisch*, 451 U.S. 390, 393 (1981), *citing Brown v. Chote*, 411 U.S. 452, 457 (1973) and *State of Alabama v. United States*, 279 U.S. 229, 231 (1929).

When applying this standard, generally the purpose of a preliminary injunction is to preserve the status quo until a trial on the merits can be held. *University of Texas v. Camenisch, supra* at 395. Here, however, petitioner seeks an injunction not to preserve but to judicially alter the status quo by enjoining enforcement of Act 199. Faced with a request for this type of relief, the Court of Appeals was very clear as to what issue was presented in this action. "[W]hether *The Pitt News* has demonstrated it is entitled to preliminary injunctive relief for the indirect economic loss it alleges." Pet. App. 20a. The Court of Appeals was also very clear as to the basis for reaching its conclusion.

> In ruling on a motion for a preliminary injunction, the district court must consider the following factors, and issue an injunction only if all four factors favor preliminary relief: (a) the likelihood that the plaintiff will prevail on the merits of its claim at the final hearing; (b) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (c) the extent to which the defendant would suffer irreparable harm if the preliminary injunction is issued; and (d) the public interest. *See New Jersey Hospital Association v.*

> *Waldman*, 73 F.3d 509, 512 (3d Cir. 1995). The district court concluded that even if *The Pitt News* had standing, the newspaper would not be entitled to a preliminary injunction because it did not show any irreparable harm. We agree, that *The Pitt News* is not entitled to preliminary injunctive relief. We need not reach to the question of irreparable harm, however, because we conclude that *The Pitt News* has not shown a likelihood of success on the merits of its claim.

Pet. App. 20a.

> We . . . proceed to the merits of the preliminary injunction *only* on the question of whether the economic effect felt by *The Pitt News* amounts to a violation of its own First Amendment rights. We hold that it does not, and will affirm.

Pet. App. 4a (emphasis added).

Petitioner now raises before this Court a whole series of other issues that have yet to be considered on the merits by any court.[4] With respect to the issue that was addressed by the Court of Appeals, whether petitioner is likely to prevail on the merits of its claim that the economic effects that it felt due to the enforcement of Act 199 against others amount to a violation of its First Amendment rights; petitioner argues that the Court

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[4]It is worth noting that in the more than six months since the Court of Appeals' decision, petitioner has taken no affirmative steps to pursue or press for a quick resolution of those issues in the district court.

of Appeals' conclusion is somehow contrary to the decisions of this Court. It is not.

The Court of Appeals held that:

> The fact that *The Pitt News* has demonstrated a connection between the enforcement of Act 199 and the reduction in its advertising revenues from purveyors of alcoholic beverages, along with the resulting reduction in the length of its publication, does not mean that one of its constitutionally protected interests has been injured. This amounts to nothing more than an incidental economic effect of a regulation aimed at closely regulated third parties. Act 199 does not directly restrict the content of *The Pitt News*. . . . *The Pitt News* "proceeds on the erroneous premise that it has a constitutional right not only to speak, but to speak profitably." *Am Sat Cable Limited v. Cable Vision of Connecticut*, 6 F.3d 867, 871 (2d Cir. 1993) (holding that although content of cable television transmissions has First Amendment protection, government regulation that has incidental economic effect of forcing a cable operator out of business does not injure operator's First Amendment rights). "[E]conomic loss . . . does not constitute a First Amendment injury. The inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of [an] ordinance upon freedom of expression." *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990), *cert. denied*,

> [501 U.S. 1222 (1991)] (quoting *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 78 (1976)] (Powell, J. concurring)....

Pet. App. 21a-22a.

In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), this Court was presented with a zoning ordinance that restricted where adult movie theaters could operate. In agreeing that the ordinance withstood a First Amendment challenge, Justice Powell observed that:

> The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. . . . The inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of the ordinance upon freedom of expression.

Id. at 77-78 (Justice Powell concurring). *See also City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1985)(the First Amendment requires only that the City refrain from effectively denying respondent's a reasonable opportunity to operate their business within the City, the ordinance before us easily meets this requirement)(quoting *Young v. American Mini Theaters, Inc., supra*). Petitioner now asserts that the principles established in *Young, supra* and *City of Renton, supra* are somehow called into question by *Simon & Schuster, Inc. v. Members of the New York State Crime Victim's Board*, 502 U.S. 105 (1991). The assertion is incorrect.

In *Simon & Schuster*, publishers brought an action challenging the constitutionality of New York's Son of Sam

Law, a statute concerning books written by perpetrators about their crimes. The Son of Sam law applied directly to those publishers and required the publisher to take specific actions under it. *Id.* at 109, 116. Accordingly, *Simon & Schuster, Inc.* is distinguishable[5] from the present action. Unlike the Son of Sam Law, Act 199 simply does not apply to petitioner.[6] The Court of Appeals correctly determined that enforcement of Act 199 amounts to nothing more than an incidental economic effect of regulations on closely regulated third parties.[7] This Court

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[5]Despite petitioner' s assertions to the contrary, the Court of Appeals did distinguish *Simon & Schuster* in its opinion, in the context of standing; noting that in *Simon & Schuster, Inc.*, the Court held that its analysis would be the same whether the First Amendment speaker was considered to be the author or the publisher. Pet. App. 14a.

[6]That also distinguishes the present action from cases such as *Miami Herald Publishing Co v. Tornillo*, 418 U.S. 241 (1974). A case involving a state right of reply statute that applied to all newspapers and required them to print, in compliance with very detailed criteria, the reply of a candidate for public office whose personal character had been criticized by the newspaper's editorials. *Id.* at 244. In his concurrence in that decision, Justice White stated that "the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, *with news and editorial content is concerned." Id.* at 259 (emphasis added).

[7]In an effort to circumvent the Court of Appeals' analysis, petitioner also cites to a series of tax cases. However, as the Court of Appeals correctly pointed out, unlike Act 199 in all of the tax cases the statutes directly regulated or penalized the newspapers involved. *See Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (involving a discriminatory tax placed directly on the newspaper); *Minneapolis Star and Tribune v. Minnesota*

has repeatedly held that such indirect economic effects do not implicate the First Amendment. The Court of Appeals certainly did not abuse its discretion in concluding that petitioner is not likely to prevail on the merits of its claim that such indirect economic effects amount to a violation of its First Amendment rights.

In *Turner Broadcasting Systems, Inc. v. Federal Communications Commission*, 507 U.S. 1301 (1993) (Rehnquist, C.J., circuit justice), Chief Justice Rehnquist was faced with a request for relief that is remarkably similar to the relief requested here. In that action, as here, the relief sought was to enjoin enforcement of a statute pending its challenge on First Amendment grounds. *Id.* at 1301. In that action, as here, the courts below had denied such injunctive relief. *Id.* at 1302. In that action, as here, an injunction was not being sought to preserve the status quo, but to judicially intervene to alter it. *Id.*

> By seeking an injunction, applicants request that I issue an order altering the legal status quo. Not surprising, they do not cite any case in which such extraordinary relief has been granted, either by a single justice or by the whole Court.

Id. at 1302-1303. The Chief Justice denied that extraordinary relief holding that the act in question, like all statutes, is

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Commissioner of Revenue, 460 U.S. 575 (1983) (involving a Minnesota tax that was applied directly to the publication) and *Grossjean v. American Press Co.*, 297 U.S. 238 (1936) (where a Louisiana tax was applied directly to the newspaper). *See* Pet. App. 22a.

presumptively constitutional and that it should remain in effect pending a final decision on the merits.[8] *Id.* at 1302, 1304. In *Turner Broadcasting Systems, supra*, the same extraordinary relief was sought as petitioner seeks here. In that action the request for that relief was denied, it should be denied here. The petition for writ of certiorari should be denied.

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[8]When those merits were subsequently addressed by the Court the act in question was held to be constitutional. *Turner Broadcasting Systems, Inc., et al. v. Federal Communications Commission, et al.*, 520 U.S. 180, 185 (1997).

CONCLUSION

For these reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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